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Nos. 86-152, 86-153 and 86-154

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

INVESTMENT COMPANY INSTITUTE,
Petitioner,

v.

ROBERT L. CLARKE, *et al.*,
Respondents.

BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, THE NINTH CIRCUIT AND THE SECOND CIRCUIT

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QUESTION PRESENTED

Whether three Courts of Appeals correctly upheld rulings by the Comptroller of the Currency authorizing each of several national banks to establish a common fund for collective investment of assets held by the bank as trustee for IRA trusts.

PARTIES TO THE PROCEEDING

The petitioner in this action is the Investment Company Institute ("ICI"). The respondents are the Office of the Comptroller of the Currency, United States of America, Citibank, N.A., Wells Fargo Bank, N.A., The Bank of California, N.A., The Connecticut Bank & Trust Company, N.A. and The Connecticut Bank & Trust Company IRA Collective Investment Fund. The corporations affiliated with the bank respondents under Rule 28.1 of this Court are listed in Appendix 1 to this brief.

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BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, THE NINTH CIRCUIT AND THE SECOND CIRCUIT

Respondents Citibank, N.A., Wells Fargo Bank, N.A., The Bank of California, N.A., The Connecticut Bank & Trust Company, N.A. and The Connecticut Bank & Trust Company IRA Collective Investment Fund respectfully pray that the petitions for Writs of Certiorari to review the judgments and opinions of the United States Courts of Appeals for the District of Columbia Circuit, the Ninth Circuit and the Second Circuit, be denied.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit (1a-23a)[1] is reported at

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[1] Citations herein to material printed in the appendix appears as (——a) or at ——a. Unless otherwise indicated (*e.g.*, Second Circuit Appendix ——a), citations are to the appendix to the petition for a writ of certiorari to the District of Columbia Circuit. *Investment Company Institute v. Clarke*, No. 86-152 (U.S. July 31, 1986).

790 F.2d 925. The opinion of the United States District Court for the District of Columbia (24a-38a) is reported at 596 F. Supp. 1496. The decision of the Comptroller of the Currency ("Comptroller") authorizing Citibank, N.A. to establish common trust funds for the collective investment of individual retirement account ("IRA") trusts (39a-51a) is unreported.

The opinion of the United States Court of Appeals for the Second Circuit (Second Circuit Appendix 1a-3a) is reported at 789 F.2d 175. The opinion of the United States District Court for the District of Connecticut (Second Circuit Appendix 4a-13a) is reported at 630 F. Supp. 593. The decision of the Comptroller relating to The Connecticut Bank & Trust Company, N.A. (Second Circuit Appendix 14a-35a) is unreported.

The opinion of the United States Court of Appeals for the Ninth Circuit (Ninth Circuit Appendix 1a-6a) is reported at 793 F.2d 220. The opinion of the United States District Court for the Northern District of California (Ninth Circuit Appendix 7a-27a) is reported at 593 F. Supp. 846. The decisions of the Comptroller relating to Wells Fargo Bank, N.A. (Ninth Circuit Appendix 30a-44a), and The Bank of California, N.A. (Ninth Circuit Appendix 45a-46a) are unreported.[2]

STATUTES INVOLVED

The statutes principally involved in this action are the provision of the National Bank Act authorizing banks to offer fiduciary services,[3] Sections 16 and 21 of the

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[2] All of the Comptroller's decisions may be found in the Appendix in each case. Petitioners have reproduced the court opinions only in the appendix pertaining to that case.

[3] 12 U.S.C. § 92a.

Glass-Steagall Act[4] and certain provisions of the Employees Retirement Income and Security Act (ERISA).[5] The text of relevant portions of these statutes is set out in Appendix 2.

STATEMENT OF THE CASE

The National Bank Act empowers national banks to offer trust services.[6] The Comptroller of the Currency is charged with the administration of the Act and the supervision of national banks. Petitioner trade association ("ICI") challenges a determination by the Comptroller that national banks serving as trustees for personal retirement trusts commonly known as IRAs may provide collective investment services.

IRA trusts are authorized by the Employee Retirement and Income Security Act (ERISA).[7] Under ERISA an individual may create a personal tax-exempt IRA trust under state law with a plan for distribution on retirement

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[4] The Glass-Steagall Act was enacted as part of the Banking Act of 1933, 48 Stat. 162, and is codified at various sections of Title 12 of the United States Code. The provisions relevant to this action are Sections 16 and 21 of the Act, 12 U.S.C. §§ 24 (Seventh) and 378.

[5] Employment Retirement Income Act of 1974, Pub. L. No. 93-406, 88 Stat. 829. The provisions principally relevant to this action are codified at 26 U.S.C. §§ 408(a), (e), (f) and (m) and 4975 (d)(8).

[6] 12 U.S.C. § 92a.

[7] Employment Retirement Income Act of 1974, Pub. L. No. 93-406, 88 Stat. 829. Congress has encouraged the establishment of a variety of benefit programs including Keogh, stock bonus, pension, profit-sharing and other plans through the preferential tax treatment of qualifying plans under the Internal Revenue Code. IRC §§ 401(a), (c) and 501(a). ERISA is one of the series of statutes by which Congress has provided for such programs. IRAs and Keoghs are retirement savings plans established by individuals, while the other benefit plans are generally established by employers.

or death.[8] Funding of the trust is limited to modest annual contributions.[9] The individual creating the trust may direct the trustee in how to invest the trust assets. ERISA provides that a bank may serve as the IRA trustee, and authorizes the trustee to pool the assets of individual IRA trusts in a fund for collective investment.[10]

Each of the respondent national banks has offered to its IRA customers the opportunity to establish IRA trusts and have the bank, as trustee, place the IRA trust assets in a variety of permissible investments. Among these alternatives, each bank has established one or more collective funds to pool the assets of individual IRA trusts for common investment.[11] Before inaugurating its service, each bank received assurance from the IRS of tax qualification under ERISA, filed securities law registration statements required by the SEC, and applied to the

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[8] 26 U.S.C. (hereinafter "IRC") § 408.

ERISA imposes a number of restrictions "to insure that [an IRA] will be used for retirement savings" S. Rep. No. 383, 93d Cong., 1st Sess. 132 (1973). There are significant penalties for any distribution of funds from the trust other than at retirement age, or in the event of disability or death. IRC §§ 401(a), 408(a)(6) and 408(f). IRA trusts are not transferable to any other person and cannot be used as security for a loan. IRC § 408(e). ERISA also prohibits investment of IRA assets in ways thought to be inconsistent with IRAs' retirement savings purposes, such as in life insurance contracts or collectibles. IRC §§ 408(a)(3) and (m).

[9] IRC § 408(a)(1).

[10] IRC §§ 408(a) and (e)(6).

[11] The collective funds are also trusts. *See* Decision of the Comptroller of the Currency on the Application by Citibank, N.A., Pursuant to 12 C.F.R. § 9.18(c)(5) to Establish Common Trust Funds for the Collective Investment of Individual Retirement Account Trust [Assets] Exempt from Taxation under Section 408 of the Internal Revenue Code of 1954 (October 21, 1982) (39a) and similar decisions with respect to Wells Fargo Bank, N.A. (52a), The Bank of California, N.A. (67a) and The Connecticut Bank & Trust Company, N.A. (69a) (hereinafter "Citibank Decision," "Wells Fargo Decision," "The Bank of California Decision" and "Connecticut Bank & Trust Decision").

Comptroller for a determination that the proposed trust service complied with the requirements of the National Bank Act and the Comptroller's Regulations.[12]

The Comptroller issued a detailed written decision for each application, and in each case he approved the proposed activity as a permissible bank trust service. He found that banks have traditionally used collective funds to invest trust assets. He determined that his Regulations specifically authorize banks to pool trust assets for investment and, in particular, to pool the assets received under tax-exempt statutory trusts such as those involved here.[13] The Comptroller also found overwhelming evidence that Congress intended banks to serve as trustees for IRA trusts and collectively invest the assets of these trusts through a common fund.[14] He concluded that the IRA collective trust service complied with his Regulations and was a proper manifestation of the trust powers affirmatively authorized for banks.[15]

The Comptroller's first decision concerned the application of Citibank, N.A.[16] Petitioner ICI challenged the

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[12] *See* Citibank Decision (39a); Wells Fargo Decision (52a); The Bank of California Decision (67a); Connecticut Bank & Trust Company Decision (69a).

[13] Citibank Decision at 40a; Wells Fargo Decision at 55a; The Bank of California Decision at 67a; Connecticut Bank & Trust Decision at 73a. *See* 12 C.F.R. § 9.18(a)(1) (collective investment of funds received in trust); 12 C.F.R. § 9.18(a)(2) (collective investment of assets of statutory tax-exempt plans).

[14] Citibank Decision at 42a ("[T]he overwhelming conclusion to be drawn from ERISA and its legislative history is that Congress believed it to be within the power of banks to serve as trustees for IRA trusts and to collectively invest the assets of those trusts in common trust funds or in collective investment funds for retirement plan assets."). *See* Wells Fargo Decision at 56a; The Bank of California Decision at 67a; Connecticut Bank & Trust Decision at 73a.

[15] Citibank Decision at 40a, 43a-45a; Wells Fargo Decision at 56a-57a, 63a, 65a; The Bank of California Decision at 67a; Connecticut Bank & Trust Decision at 73a, 82a, 85a-86a.

[16] Citibank Decision (39a).

Comptroller's ruling in an action in the District Court for the District of Columbia. It then challenged the succeeding rulings on the other bank applications in district courts in different circuits. The affected banks were parties in their respective cases. In each case, ICI claimed that the Comptroller's ruling was based upon an inappropriate interpretation of certain provisions of the Glass-Steagall Act.

The Glass-Steagall Act prohibits national banks from underwriting or issuing "securities".[17] When a bank commingles the assets of individual trusts for collective investment, the assets of each participating trust are exchanged for an undivided ownership interest in the common fund. ICI claimed that this "undivided interest" issued by the bank was a "security" for purposes of the Glass-Steagall Act, and that the bank was therefore precluded from establishing the common fund.

The Comptroller had carefully considered this possibility, and rejected it. In doing so, the Comptroller made three principal determinations:

> *First*, in discussing the applicable legal principles, the Comptroller found that the trust powers authorized under the National Bank Act and the banking Regulations embraced the use of a common fund, and that it had long been recognized that a national bank can, consistent with the banking laws (including the Glass-Steagall Act), commingle funds that it receives for bona fide fiduciary purposes. He therefore concluded that the relevant inquiry concerned the presence of bona fide fiduciary services.[18]
>
> *Second*, the Comptroller carefully examined the relationships between the bank trustee, the IRA participants, and the common fund. He found, both in law and in fact, that the bank was performing the

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[17] 12 U.S.C. §§ 24 (Seventh) and 378.

[18] Citibank Decision at 43a, 45a; Wells Fargo Decision at 60a-61a; The Bank of California Decision at 67a; Connecticut Bank & Trust Decision at 78a-79a.

functions of trustee and was commingling funds that it received for bona fide fiduciary purposes. The Comptroller believed that the Glass-Steagall inquiry was concluded by his determination that the proposed trust service was the manifestation of traditional, and bona fide, trust powers.[19]

Third, the Comptroller nonetheless proceeded to examine the safety and soundness of the proposed trust service in light of this Court's articulation in *Camp*[20] of the risks that the Glass-Steagall Act was designed to prevent. He took into account the requirements imposed by ERISA and other laws and experience in the history of the administration of bank common funds. The Comptroller concluded that the risks here were negligible or nonexistent and were not different from the risks engendered by banks' provision of other trust fiduciary services.[21]

The Comptroller's rulings and petitioner's contentions have now been reviewed and decided by three courts of appeals. Each court of appeals has affirmed the Comptroller's decisions.[22] (In a fourth proceeding, a district court in another circuit has also affirmed the Comptroller's

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[19] Citibank Decision at 43a; Wells Fargo Decision at 61a-63a; The Bank of California Decision at 67a; Connecticut Bank & Trust Decision at 79a-82a.

[20] *Investment Company Institute v. Camp*, 401 U.S. 617 (1971).

[21] Citibank Decision at 43a-45a; Wells Fargo Decision at 63a-65a; The Bank of California Decision at 67a; Connecticut Bank & Trust Decision at 82a-86a.

[22] The district courts in the Citibank and The Connecticut Bank & Trust cases upheld the Comptroller's decisions. The District of Columbia Circuit and the Second Circuit affirmed. The district court decision in the Wells Fargo Bank/The Bank of California case was the only case to upset any of the Comptroller's decisions. It was reviewed de novo and reversed by the Ninth Circuit. *See ICI v. Clarke*, Ninth Circuit Appendix at 1a-6a. Every court upholding the Comptroller's decisions has considered, and rejected, the analysis of the district court in the Wells Fargo Bank/The Bank of California case.

decision.[23]). The fullest exposition of the court's reasoning is contained in the opinion of the Court of Appeals for the District of Columbia Circuit.[24] ICI seeks a writ of *certiorari* to each court of appeals.

ICI has filed separate, but virtually identical petitions in the three cases. Respondent Comptroller and the respondent banks oppose *certiorari*. The bank respondents are filing this single opposition for all three cases.

REASONS FOR DENYING THE WRIT

The Comptroller of the Currency is charged with the administration of the National Bank Act and the supervision of national banks. The National Bank Act empowers banks to provide trust services. It is well established that this power embraces the authority to pool assets received in trust in a common fund for investment. The Comptroller carefully examined the IRA trust program and found it well within the parameters of bank trust powers.

The Comptroller's decision represents the application of settled principles of law and practice. Banks have, consistently with the Glass-Steagall Act, commingled trust assets for years and, in particular, have commingled funds when acting as fiduciary under statutory tax-exempt programs such as the program here. Congress has selected banks to perform this task and has regulated the bank commingled funds under the tax and securities laws. Until now, no lawsuit or administrative action has ever challenged the permissibility of such services by banks.

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[23] *See Investment Company Institute v. Clarke*, C.A. No. C-C-86-0032-M (W.D.N.C. August 20, 1986). On August 20, 1986 the district court issued a memorandum order granting defendants' motions for summary judgment and denying plaintiff's motion for summary judgment, thus upholding the Comptroller's ruling. The text of the court's memorandum order is reproduced in Appendix 3.

[24] 1a-23a.

The Comptroller based his decision on the affirmative grant of trust powers to national banks and the long established use of commingled funds for trust assets. He considered and applied this Court's decision in *Camp*, noting the sharp distinction drawn by the Court between a commingled fund anchored in the exercise of trust powers and one dedicated solely to gathering funds for unrestricted general investment. He properly concluded that the trust service offered here was a bona fide trust service both in fact and law, and was fully in accord with the Glass-Steagall Act.

The petition raises only one question: whether the Comptroller has articulated a reasonable basis to support his application of the national banking laws. Petitioner has raised its arguments in three separate cases in a vain effort to provoke a conflict in circuits. Petitioner's views have been completely aired before three courts of appeals and all have concluded that the Comptroller's decision should be upheld. There is clearly no issue warranting this Court's review.

A. The Comptroller's Decisions Represent the Application of Settled Principles of Law and Practice

The trust provisions of the national banking laws have coexisted with the prohibitions of the Glass-Steagall Act for more than fifty years. During this entire period of time, banks have used commingled funds in the performance of their trust functions.[25] The Federal Reserve

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[25] National banks began to organize common trust funds as early as 1927, in accordance with their general trust powers. *Investment Company Institute v. Camp*, 401 U.S. at 624. *See* Federal Reserve Act of 1913, § 11, 38 Stat. 261 (trust powers for national banks). The Glass-Steagall provisions were enacted in 1933.

Congress first addressed banks' collective investment of trust funds in favorable tax legislation in 1936. Revenue Act of 1936, § 169, Pub. L. No. 74-740, 40 Stat. 1708. The current version is codified at IRC § 584.

Board issued regulations expressly authorizing, and regulating, common investment of trust assets by national banks in 1936.[26] As this Court noted in its *Camp* decision in 1971, there is "no reason to doubt that a national bank can, consistently with the banking laws, commingle trust funds." [27]

For decades national banks have served as fiduciaries for, and have used commingled funds for, Keogh plan trusts and other benefit and retirement trusts that qualify like IRA trusts for special tax treatment under the Internal Revenue Code.[28] As early as 1955 the Federal Reserve Board promulgated regulations specifically recognizing the propriety of banks' use of commingled funds for these tax-exempt trusts.[29] These regulations

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[26] 1 *Fed. Reg.* 417 (1936). The successor provision to that initial regulation is currently in effect as a regulation of the Comptroller. It provides:

> "Where not in contravention of local law, funds held by a national bank as fiduciary may be invested collectively . . . [i]n a common trust fund maintained by the bank exclusively for the collective investment and reinvestment of moneys contributed thereto by the bank in its capacity as a trustee, executor, administrator, guardian or custodian under a uniform gifts to minors act."

12 C.F.R. § 9.18(a)(1). A separate section of the Comptroller's regulations authorizes commingling of the assets of statutory tax-exempt plans. *See infra* n.29.

[27] *Investment Company Institute v. Camp*, 401 U.S. at 624.

[28] *See* SEC Release No. 33-6188, 45 Fed. Reg. 8960, 8968 (1980); SEC, *Policy Implications of Investment Company Growth*, H.R. Rep. No. 2337, 89th Cong., 2d Sess. 36 n.24 (1966); *see also Internal Revenue Code of 1954: Hearings Before the Senate Finance Comm. on H.R. 8300, Pt. 4*, 83d Cong., 2d Sess. 2115 (1954) (statement by the New York Bankers Association that in 1954, "[b]anks and trust companies administer probably more than 70 percent of the total assets in private employees trusts in the United States").

[29] 20 Fed. Reg. 3305 (1955). The successor provision to that initial regulation is currently in effect as a regulation of the Comptroller. It provides:

facilitated bank collective investment of trust assets under these programs by removing certain constraints upon the promotion and scope of the trust service.[30]

Over the years, as Congress has renewed and enlarged statutory benefit programs it has confirmed the propriety of bank collective funds to manage the assets of trusts established for these programs. When tax-exempt retirement plans were made available to self-employed individuals in the 1962 Keogh legislation,[31] Congress contemplated that those individuals would have access to retirement programs on a "reasonably similar basis" to that accorded corporate stockholder employees under prior programs, and specifically provided that banks would serve as trustees.[32] Banks rapidly began to offer their fiduciary and collective investment services for Keogh trusts.[33] When questions arose with respect to the status of the commingled funds under the securities laws (some banks had registered Keogh commingled funds, others had not), Congress acted in 1970 to "clarif[y] the status of . . .

> "Where not in contravention of local law, funds held by a national bank as fiduciary may be invested collectively . . . [i]n a fund consisting solely of assets of retirement, pension, profit sharing, stock bonus or other trusts which are exempt from Federal income taxation under the Internal Revenue Code."

12 C.F.R. § 9.18(a)(2).

[30] *See* 20 Fed. Reg. 3305 (1955). The current form of the regulations similarly relieves collective funds for statutory benefit trusts from certain restrictions regarding promotion and other matters that generally apply to collective funds for other bank trusts. *See* 12 C.F.R. § 9.18(b).

[31] Self-Employed Individuals Tax Retirement Act of 1962, Pub. L. No. 87-792, 76 Stat. 809 (1962).

[32] *See* S. Rep. No. 992, 87th Cong., 1st Sess. 8 (1961); H.R. Rep. No. 378, 87th Cong., 1st Sess. 2-3 (1961). The provision dealing with banks' service as trustees is codified at IRC § 401(d)(1).

[33] *See* SEC Rel. No. 33-6188, 45 Fed. Reg. 8960, 8968 (1980); SEC, *Policy Implications of Investment Company Growth*, H.R. Rep. No. 2337, 89th Cong., 2d Sess. 36 n.24 (1966).

bank collective funds" under those laws,[34] by giving the SEC authority to require registration where appropriate in order to protect settlors and beneficiaries of these trusts.[35]

Consistently with this history, when Congress enacted ERISA in 1974 it provided for banks to serve as trustees for individual IRA trusts[36] and collectively invest these assets through a common fund.[37] Congress noted that banks had similarly pooled individual retirement trusts under the Keogh and other benefit legislation,[38] and it intended that IRA trust funds "be invested in a wide variety of assets including . . . common trust funds maintained by banks."[39] ERISA's terms specifically au-

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[34] S. Rep. No. 184, 91st Cong., 1st Sess. 2 (1969), *reprinted in* 1970 U.S. Code Cong. & Ad. News 4897, 4898.

[35] Investment Company Amendments Act of 1970, Pub. L. No. 91-547, 84 Stat. 1413.

[36] IRC § 408(a).

[37] ERISA specifically refers to collective funds in IRC §§ 408 (a)(5), (e)(6) and 4975(d)(8). The IRS has formally advised each bank respondent in these cases that its collective trust was qualified as a "collective investment trust" under § 408(a)(5) and would be so treated for tax purposes. *E.g.*, Joint Appendix A-388 to A-390, *ICI v. Conover*, 790 F.2d 925 (D.C. Cir. 1986).

[38] The Conference Report on ERISA observed: "The conferees understand that it is common practice for banks, trust companies, and insurance companies to maintain pooled investment funds for plans." It declared that ERISA approved such "pooled fund[s] maintained by a bank, etc., which is a plan fiduciary" since "generally the net effect of pooling plan assets is . . . more efficient investment management." H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. 316, *reprinted in* 1974 U.S. Code Cong. & Ad. News 5038, 5096. In explaining the collective investment funds that were permitted, the Conference Report cited IRS rulings approving similar bank collective investment under other statutory tax-exempt programs. *See id.* (citing Rev. Rul. 56-267, 1956 C.B.-1 at 206).

[39] 119 Cong. Rec. 30,058 (1973) (remarks of Sen. Nelson, manager of the bill). Similarly, the Senate Finance Committee report on ERISA listed the investments available for IRA accounts and

thorize the transaction by which trust assets are transferred to the commingled funds by the "sale or purchase of an interest" in a "common or collective trust fund or pooled investment fund maintained by a . . . bank or trust company supervised by a State or Federal agency." [40]

Throughout this history, banks' collective funds for trust administration have also been subject to the federal securities laws. Interests in all collective funds are "securities" for securities laws purposes, and are subject to varying degrees of regulation.[41] The securities

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included "a common trust fund managed by a bank." S. Rep. No. 383, 93d Cong., 1st Sess. 132 (1973), *reprinted in* 1974 U.S. Code Cong. & Ad. News 4890, 5015.

[40] IRC § 4975(d)(8). This provision specifically authorizes the transaction in which the bank exchanges assets of an individual IRA trust for an interest in the common fund, by exempting that transaction from the self-dealing prohibitions in the Code that would otherwise apply. The Conference Report on this section stated that ERISA "allows the purchase and sale of interests in a pooled fund maintained by a bank." H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. 316, *reprinted in* 1974 U.S. Code Cong. & Ad. News 5038, 5096. *See also* Staff of Joint Comm. on Internal Revenue Taxation, 93d Cong., 1st Sess., *Tax Treatment of Pension Plans, Part Two: Individual Retirement Accounts, Limitations on Contributions, and Lump Sum Distributions* 3 (Comm. Print 1973) (funds in IRA could be invested "in a common trust fund managed by a bank").

[41] Interests in common trust funds are "securities" under the securities laws. *See* Securities Act of 1933, § 2(1), 15 U.S.C. § 77b(1). Interests in a "common trust fund or similar fund" maintained by a bank for the collective investment of assets held by the bank as trustee, executor, administrator or guardian are exempt from registration under the Securities Act of 1933 ("1933 Act"). Securities Act of 1933, § 3(a)(2), 15 U.S.C. § 77c(a)(2). Interests in bank collective trust funds issued in connection with a "stock bonus, pension, or profit-sharing plan" qualifying under IRC

laws were enacted for purposes quite distinct from the purposes of the Glass-Steagall Act, and it has consistently been recognized that the interests in these commingled funds are not "securities" for Glass-Steagall Act purposes when the bank is offering bona fide trust services.[42]

In his decisions below, the Comptroller found that the proposed bank services were wholly in accord with ERISA and with the exercise of bank trust powers. He noted

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§ 401 are also exempt from registration under the 1933 Act. *Id.* Congress has left to the SEC authority to exempt interests in collective funds for Keogh trusts from registration under the 1933 Act. *Id.* A "common trust fund or similar fund" maintained by a bank for the collective investment of monies received by the bank as a trustee, executor, administrator or guardian is exempted from the definition of "investment company" under the Investment Company Act. 15 U.S.C. § 80a-3(c)(3). Similarly, bank collective funds consisting of the assets of qualified employees' stock bonus, pension or profit-sharing trusts, including Keogh plans, are exempted from the definition of "investment company" under the Investment Company Act. 15 U.S.C. § 80a-3(c)(11).

ERISA did not address the treatment under the securities laws of interests in collective funds for the assets of IRA trusts. The legislative history indicated that "[t]he Securities and Exchange Commission will have authority to act on the issues with respect to individual retirement accounts independently of this legislation." S. Conf. Rep. No. 1090, 93d Cong., 2d Sess. 338 (1973).

[42] Citibank Decision at 44a. *See generally* Connecticut Bank & Trust Decision at 86a-88a. The Glass-Steagall Act does not contain any definition of "security," nor does it adopt the definitions used in the federal securities laws.

As the Comptroller, and all the courts below, have noted: "The mere fact that interests in the [Collective] Trust qualify as 'securities' within the meaning of the securities laws does not mean that they are 'securities' forbidden to banks by the Glass-Steagall Act. Such a conclusion would . . . invalidate all bank collective investment vehicles" in contradiction to this Court's recognition in *Camp* that "there is no reason to doubt that a national bank can, consistently with the banking laws, commingle trust funds." *Id.* at 87a; *see Camp*, 401 U.S. at 624.

that banks may clearly commingle funds received for bona fide fiduciary purposes and had no difficulty in concluding that those purposes were present here. The bank acts as IRA trustee by statutory mandate under ERISA; the terms of the Act call for a written trust agreement; the trusts employed by the bank are trusts under common law; and the bank is charged with the duties of trustee.[43] The trust assets are, in each case, placed in a fund that commingles only IRA trust assets and is dedicated to the preservation and investment of those assets for distribution in accordance with the terms of each trust upon retirement, disability or death.

The Comptroller went on to conclude that the Glass-Steagall Act did not prohibit the appropriate exercise of trust powers. That conclusion embodies settled principles of law and practice. The Act has never been construed to prohibit the commingling of assets received in trust for bona fide fiduciary purposes and, more particularly, assets of tax-exempt retirement trusts.[44] The propriety of the commingling is reflected in the regulations of the banking agencies and in the collective invest-

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[43] Citibank Decision at 41a-42a; Wells Fargo Decision at 53a-54a; Connecticut Bank & Trust Decision at 71a.

[44] ICI itself conceded below that a bank may lawfully commingle IRA trust assets "as an aid to the bank's administration of the individual trusts." Brief for Appellant at 41, *ICI v. Conover*, 790 F.2d 925. It similarly concedes in its Petitions in these cases that "a bank does not engage in . . . prohibited activities [under Glass-Steagall] when it . . . commingles the assets of preexisting [IRA] trusts in a common trust fund. Petition for Writ of Certiorari filed in *Investment Company Institute v. Clarke*, No. 86-152 (U.S. July 31, 1986) (D.C. Circuit Petition) at 14 n.19; Petition for Writ of Certiorari filed in *Investment Company Institute v. Clarke*, No. 86-153 (U.S. July 31, 1986) (Ninth Circuit Petition) at 15 n.18; Petition for Writ of Certiorari filed in *Investment Company Institute v. Clarke*, No. 86-154 (U.S. July 31, 1986) (Second Circuit Petition) at 12 n.17.

ment trust services that banks have long provided, consistent with the Glass-Steagall Act, for Keogh trusts and other trusts under programs continually renewed by Congress. Banks serving as statutory fiduciaries under these tax-exempt plans have managed billions of dollars in collective investment vehicles properly offered for decades without legal or administrative challenge.[45]

B. The Comptroller's Decisions Are Wholly In Accord With This Court's Decision In *ICI v. Camp*

In *ICI v. Camp*[46] this Court considered the application of the Glass-Steagall Act to a novel bank plan to market interests in a common fund for unrestricted general investment by the public. Customers participated in the investment fund by designating the bank as their managing agent to purchase shares in the bank's common fund.[47] The customer was free to pledge or transfer his shares in the investment fund to any person or to redeem them at any time.[48] Participation in the investment fund was unrelated to any trust relationship or any other bank service.

The Court noted that the Glass-Steagall Act was generally designed to separate commercial banking from investment banking.[49] It said that commercial banking included the exercise of trust powers and it was well established that banks were authorized to use common funds for this activity.[50] In the Court's view, there was "no reason to doubt" that the Glass-Steagall Act permitted

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[45] *See Final Report of the SEC on Bank Securities Activities* in SEC, *Reports on Bank Securities Activities*, 95th Cong., 1st Sess. (1977) at 453.

[46] 401 U.S. 617.

[47] *Id.* at 622-23.

[48] *Id.* at 622.

[49] *Id.* at 629.

[50] *Id.* at 624-25.

a bank to commingle assets received for bona fide trust purposes.[51] However, the Court found that the managing agency commingled fund at issue in *Camp* was a new concept which did not involve either the offering of trust services or any other form of commingling established in commercial bank practice.[52] Despite the novelty of the bank's program, the Comptroller had not offered any "expressly articulated position" concerning the applicability of the Glass-Steagall Act.[53] Accordingly, the Court undertook its own analysis of the application of the Act's policies and concluded that the bank's fund involved a potential for abuse and risks to the bank that the Glass-Steagall Act was intended to avoid.[54]

The Comptroller carefully applied the principles stated by this Court in *Camp*. First, he looked to determine whether the IRA trust assets were received for bona fide trust purposes and he concluded that they were. That was the proper inquiry for, as this Court made clear in *Camp*, there is no doubt about the authority of a bank to commingle funds received for bona fide trust purposes.[55] Second, he examined the relationship between the IRA trust and the commingled fund and concluded that the fund in fact provided for the management of assets and their distribution in accordance with the terms of the trust upon retirement, disability or death. Under *Camp*, that inquiry established that the fund was dedicated to carry out the purposes of the IRA trusts rather than offering some investment service extraneous to banking powers. Third, he found that the use of commingled funds for retirement trusts had long been an established bank trust practice clearly within the ambit of customary bank activities.

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[51] *Id.* at 624-25.

[52] *Id.* at 624-25.

[53] *Id.* at 627.

[54] *Id.* at 634-38.

[55] *Id.* at 624.

The Comptroller properly concluded that these considerations were dispositive. They removed the infirmities that led the Court in *Camp* to take the additional step of measuring a novel bank commingled fund, approved without explanation, against concerns to which the Glass-Steagall Act was directed. He nevertheless proceeded also to examine the IRA trust service in light of those concerns and concluded that the potential for abuse or risk to the bank was negligible.

The Comptroller's assessment of these risks rested on the limitations imposed on the commingled IRA fund by ERISA and other requirements of law and upon his experience in dealing with issues of bank confidence and safety in the long history of supervision of common trust funds administered by banks. The courts below found that the Comptroller's evaluation was appropriate and dealt with complex matters particularly within his expertise.[56] The Court of Appeals for the District of Columbia Circuit specifically addressed the Comptroller's analysis of the *Camp* case. It confirmed that there were significant differences between the IRA common fund and the managing agency common fund and that those differences diminished the concerns articulated by this Court in *Camp*.[57] It focused particularly upon the "promotional pressures" discussed in *Camp* and noted that the Comptroller had carefully evaluated each in reaching his conclusion.[58] The Court viewed this evaluation as "eminently reasonable." [59]

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[56] *ICI v. Conover* at 19a-23a (D.C. Circuit decision); *ICI v. Clarke*, Ninth Circuit Appendix at 3a (Ninth Circuit decision); *ICI v. Clarke*, Second Circuit Appendix at 2a-3a (Second Circuit decision); *ICI v. Clarke*, Second Circuit Appendix at 5a-7a (District of Connecticut decision).

[57] *ICI v. Conover* at 8a-11a.

[58] *Id.* at 21a-22a.

[59] *Id.* at 21a.

There is no need for this Court now to review these determinations by the Comptroller. The Comptroller's decisions are fully consistent with the principles and concerns identified in *Camp*, and they are in accord with longstanding regulatory standards. They follow manifest Congressional intention. Three Courts of Appeals have scrutinized the Comptroller's conclusions on these matters, and have uniformly affirmed their propriety. No further judicial consideration is necessary.

CONCLUSION

For the foregoing reasons, the writs of certiorari should be denied.

Respectfully submitted,

/s/ Arnold M. Lerman

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APPENDICES

APPENDIX 1

Pursuant to Rule 28.1 of this Court respondents state that the corporations affiliated with them within the meaning of the rule are as follows:

Citibank, N.A.

ARRENDADORA INCI, S.A. DE C.V.
ARRENDADORA Y ADMINISTRADORA CITYCOL S.A.
BANCO INTERNACIONAL DE COLOMBIA (NASSAU) LIMITED
BANCO INTERNACIONAL DE COLOMBIA, S.A.
CENTRAL HOLDINGS CORPORATION
CITICO
CITYTRUST REALTY CORPORATION
CLARKE VICKERS LIMITED
CLARKE VICKERS SERVICES PTY. LIMITED
COMPANIA COLOMBIANA DE FINANCIAMIENTO COMERCIAL S.A.
COMPANIA EXPORTADORA CITYEXPORT S.A.
FIL-INSURE BROKERS, INC.
FINANCIERA CITICORP S.A.
FIRST CITICORP LEASING, INC.
GLOBAL ELECTRONIC MARKETS COMPANY
ISLAND FINANCE CORPORATION
MAGHREB FINANCE S.A.
NIGERIA INTERNATIONAL BANK, LIMITED
ONE SANSOME STREET ASSOCIATES INC.
ORIENT PACIFIC CAPITAL INVESTMENT CORPORATION
SAUDI AMERICAN BANK
TAIWAN FIRST INVESTMENT & TRUST CO., LTD.

Wells Fargo Bank, N.A.

WELLS FARGO & COMPANY

The Bank of California, N.A.

MITSUBISHI BANK, LIMITED
BANCAL TRI-STATE CORPORATION

The Connecticut Bank & Trust Company

BANK OF NEW ENGLAND CORPORATION

APPENDIX 2

A. The principally relevant provisions of ERISA are 26 U.S.C. §§ 408(a), (e), (f) and (m) and 4975(d)(8):

§ 408. Individual retirement accounts

(a) Individual retirement account—For purposes of this section, the term "individual retirement account" means a trust created or organized in the United States for the exclusive benefit of an individual or his beneficiaries, but only if the written governing instrument creating the trust meets the following requirements:

(1) Except in the case of a rollover contribution described in subsection (d)(3) in section 402(a)(5), 402(a)(7), 403(a)(4) or 403(b)(8), no contribution will be accepted unless it is in cash, and contributions will not be accepted for the taxable year in excess of $2,000 on behalf of any individual.

(2) The trustee is a bank (as defined in subsection (n)) or such other person who demonstrates to the satisfaction of the Secretary that the manner in which such other person will administer the trust will be consistent with the requirements of this section.

(3) No part of the trust funds will be invested in life insurance contracts.

(4) The interest of an individual in the balance in his account is nonforfeitable.

(5) The assets of the trust will not be commingled with other property except in a common trust fund or common investment fund.

(6) Under regulations prescribed by the Secretary, rules similar to the rules of section 401(a)(9) (relating to required distributions) shall apply to

the distribution of the entire interest of an individual for whose benefit the trust is maintained.

* * * *

(e) Tax treatment of accounts and annuities.—

(1) Exemption from tax.—Any individual retirement account is exempt from taxation under this subtitle unless such account has ceased to be an individual retirement account by reason of paragraph (2) or (3). Notwithstanding the preceding sentence, any such account is subject to the taxes imposed by section 511 (relating to imposition of tax on unrelated business income of charitable, etc. organizations).

(2) Loss of exemption of account where employee engages in prohibited transaction.—

(A) In general.—If, during any taxable year of the individual for whose benefit any individual retirement account is established, that individual or his beneficiary engages in any transaction prohibited by section 4975 with respect to such account, such account ceases to be an individual retirement account as of the first day of such taxable year. For purposes of this paragraph—

(i) the individual for whose benefit any account was established is treated as the creator of such account, and

(ii) the separate account for any individual within an individual retirement account maintained by an employer or association of employees is treated as a separate individual retirement account.

(B) Account treated as distributing all its assets. —In any case in which any account ceases to be an individual retirement account by reason of subparagraph (A) as of the first day of any taxable year, paragraph (1) of subsection (d) applies as

if there were a distribution on such first day in an amount equal to the fair market value (on such first day) of all assets in the account (on such first day).

(3) Effect of borrowing on annuity contract.—If during any taxable year the owner of an individual retirement annuity borrows any money under or by use of such contract, the contract ceases to be an individual retirement annuity as of the first day of such taxable year. Such owner shall include in gross income for such year an amount equal to the fair market value of such contract as of such first day.

(4) Effect of pledging account as security.—If, during any taxable year of the individual for whose benefit an individual retirement account is established, that individual uses the account or any portion thereof as security for a loan, the portion so used is treated as distributed to that individual.

(5) Purchase of endowment contract by individual retirement account.—If the assets of an individual retirement account or any part of such assets are used to purchase an endowment contract for the benefit of the individual for whose benefit the account is established—

(A) to the extent that the amount of the assets involved in the purchase are not attributable to the purchase of life insurance, the purchase is treated as a rollover contribution described in subsection (d)(3), and

(B) to the extent that the amount of the assets involved in the purchase are attributable to the purchase of life, health, accident, or other insurance, such amounts are treated as distributed to that individual (but the provisions of subsection (f) do not apply).

(6) Commingling individual retirement account amounts in certain common trust funds and common investment

funds.—Any common trust fund or comomn investment fund of individual retirement account assets which is exempt from taxation under this subtitle does not cease to be exempt on account of the participation or inclusion of assets of a trust exempt from taxation under section 501(a) which is described in section 401(a).

(f) Additional tax on certain amounts included in gross income before age 59½—

(1) Early distributions from an individual retirement account, etc.—If a distribution from an individual retirement account or under an individual retirement annuity to the individual for whose benefit such account or annuity was established is made before such individual attains age 59½, his tax under this chapter for the taxable year in which such distribution is received shall be increased by an amount equal to 10 percent of the amount of the distribution which is includible in his gross income for such taxable year.

(2) Disqualification cases.—If an amount is includible in gross income for a taxable year under subsection (e) and the taxpayer has not attained age 59½ before the beginning of such taxable year, his tax under this chapter for such taxable year shall be increased by an amount equal to 10 percent of such amount so required to be included in his gross income.

(3) Disability cases.—Paragraphs (1) and (2) do not apply if the amount paid or distributed, or the disqualification of the account or annuity under subsection (e), is attributable to the taxpayer becoming disabled within the meaning of section 72 (m)(7).

* * * *

(m) Investment in Collectibles Treated as Distributions.—

(1) In general.—The acquisition by an individual retirement account or by an individually-directed account under a plan described in section 401(a) of any collectible shall be treated (for purposes of this section and section 402) as a distribution from such account in an amount equal to the cost to such account of such collectible.

(2) Collectible defined.—For purposes of this subsection, the term "collectible" means—

(A) any work of art,

(B) any rug or antique,

(C) any metal or gem,

(D) any stamp or coin,

(E) any alcoholic beverage, or

(F) any other tangible personal property specified by the Secretary for purposes of this subsection.

* * * *

§ 4975. Tax on prohibited transactions

(d) Exemptions.—The prohibitions prescribed in subsection (c) shall not apply to—

(8) any transaction between a plan and a common or collective trust fund or pooled investment fund maintained by a disqualified person which is a bank or trust company supervised by a State or Federal agency or between a plan and a pooled investment fund of an insurance company qualified to do business in a State if—

(A) the transaction is a sale or purchase of an interest in the fund,

(B) the bank, trust company, or insurance company receives not more than reasonable compensation, and

(C) such transaction is expressly permitted by the instrument under which the plan is maintained, or by a fiduciary (other than the bank, trust company, or insurance company, or an affiliate thereof) who has authority to manage and control the assets of the plan.

B. The relevant provisions of the Glass-Steagall Act are Sections 16 and 21, codified at 12 U.S.C. §§ 24 (Seventh) and 378:

Section 16 of the Act provides, in part:

[A national bank] shall not underwrite any issue of securities or stock . . . .

Section 21 of the Act provides, in part:

[It] shall be unlawful . . . [f]or any . . . corporation . . . engaged in the business of issuing, underwriting, selling, or distributing . . . stocks, bonds, debentures, notes, or other securities, to engage at the same time to any extent whatever in the business of receiving deposits . . . .

C. 12 U.S.C. § 92a provides:

Trust Powers

(a) Authority of Comptroller of the Currency

The Comptroller of the Currency shall be authorized and empowered to grant by special permit to national banks applying therefore, when not in contravention of State or local law, the right to act as trustee, executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver, committee of estates of lunatics, or in any other fiduciary capacity in which State banks, trust companies, or other corporations which come into competition with national banks are permitted to act under the laws of the State in which the national bank is located.

APPENDIX 3

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
NORTH CAROLINA

Civil Action No. C-C-86-0032-M

INVESTMENT COMPANY INSTITUTE,
Plaintiff,

v.

ROBERT L. CLARKE, *et al.*,
Defendants.

MEMORANDUM ORDER

In this action, plaintiff, the Investment Company Institute, has challenged the November 25, 1985 decision of the Office of the Comptroller of the Currency to approve the application of the First Union National Bank to establish the First Union Fund. The First Union Fund is a Collective Trust for the commingling and collective investment of the assets of Individual Retirement Account trusts. Plaintiff contends that the decision of the Comptroller is arbitrary, capricious, an abuse of discretion, and contrary to law because, plaintiff alleges, the establishment of the First Union Fund violates the Glass-Steagall Act, *see* 12 U.S.C. §§ 24 (seventh), 378, and certain of the Comptroller's regulatory requirements. *See* 12 C.F.R. 9.18.

The parties have filed cross-motions for summary judgment. The Court has reviewed the undisputed facts, the administrative record of the Office of the Comptroller, and the extensive briefs of the parties. The Court heard argument on the cross-motions on July 30, 1986.

Upon his review of the application of First Union Bank, the Comptroller articulated a reasoned basis, in which he fully considered the applicable law, for his decision to approve the application. Deference should be shown to the Comptroller of the Currency, whose decisions concerning the banking laws should be upheld if they are reasonable and not contrary to law. The Court has reviewed the decision of the Comptroller and finds that the Comptroller's decision to approve the application of the First Union National Bank is reasonable, is not an abuse of discretion, and is not contrary to law. Furthermore, the same issue has been decided by three United States Courts of Appeals, and those courts have upheld like decisions by the Comptroller. *See Investment Company Institute v. Clarke*, 793 F.2d 220 (9th Cir. 1986); *Investment Company Institute v. Conover*, 790 F.2d 925 (D.C. Cir. 1986); *Investment Company Institute v. Clarke*, 789 F.2d 175 (2d Cir. 1986).[1]

Accordingly, defendants' motions for summary judgment are granted, plaintiff's motion for summary judgment is denied, and this action is dismissed.

It is so ordered.

Date: August 20, 1986

/s/ _____

JAMES B. MCMILLAN
United States District Judge

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[1] The Comptroller raised in his answer, but the parties did not brief, the issue of collateral estoppel. The Court, therefore, did not reach the issue of whether plaintiff, in view of the three Courts' of Appeals decisions, should be collaterally estopped from bringing this action.